

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington corporation,

Plaintiff.

V.

MOTOROLA, INC., and MOTOROLA
MOBILITY LLC, and GENERAL
INSTRUMENT CORPORATION,

Defendants

CASE NO. C10-1823-JLR

DEFENDANTS' MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF MOTOROLA'S MOTION
FOR SUMMARY JUDGMENT AND
MOTIONS TO PRECLUDE AND
STRIKE TESTIMONY OF TODD
MENENBERG AND THEO BODEWIG

**NOTED ON MOTION CALENDAR:
Friday, July 19, 2013**

DEFENDANTS' MOTION TO FILE DOCUMENTS
UNDER SEAL IN SUPPORT OF MOTOROLA'S MOTION
FOR SUMMARY JUDGMENT AND MOTIONS TO
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CASE NO. C10-1823-JLR

1 **I. INTRODUCTION**

2 Pursuant to Western District of Washington Civil Local Rule CR 5(g)(2), Defendants
3 Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, LLC, and General Instrument
4 Corporation (collectively “Motorola”) respectfully move this Court for leave to file under seal the
5 following:

6 1. Defendants’ Motion for Summary Judgment
7 2. Exhibits A, G, H, I, J, O, Y, and EE to the Declaration of Andrea Pallios Roberts in
8 Support of Defendants’ Motion for Summary Judgment.
9 3. Defendants’ Motion to Preclude and Strike Testimony of Todd Menenberg
10 4. Exhibits A and B to the Declaration of Andrea Pallios Roberts in Support of
11 Defendants’ Motion to Preclude and Strike Testimony of Todd Menenberg.
12 5. Defendants’ Motion to Exclude and Strike the Testimony of Theo Bodewig
13 6. Exhibit A and C to the Declaration of Cheryl Berry in Support of Defendants’
14 Motion to Exclude and Strike the Testimony of Theo Bodewig

15 **II. CERTIFICATION**

16 In accordance with Local Civil Rule 5(g)(3)(A), the undersigned counsel certifies that on
17 July 2 and 3, 2013 Chris Wion, Shane Cramer, and Ellen Robbins (on behalf of Microsoft) and
18 Molly Terwilliger, Andrea Pallios Roberts, and Cheryl Berry (on behalf of Motorola) met and
19 conferred, both telephonically and via email, regarding the need and extent to file under seal
20 certain limited portions of Defendants’ Motion for Summary Judgment, Motion to Preclude and
21 Strike Testimony of Todd Menenberg, and Motion to Preclude and Strike the Testimony of Theo
22 Bodewig, and supporting exhibits.

23 **III. BACKGROUND**

24 Microsoft Corporation (“Microsoft”) and Motorola entered into a stipulated Protective
25 Order, which was approved by the Court on July 21, 2011. (Dkt. No. 72.) This Protective Order
26 outlines categories of material that should be maintained in confidence, along with procedures for

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SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

1 sealing confidential material when included in documents filed with the Court. Specifically,
2 paragraph 1 specifies that:

3 Confidential Business Information is information which has not been made public
4 and which concerns or relates to the trade secrets ... amount or source of any
5 income, profits, losses, or expenditures of any person, firm, partnership,
6 corporation, or other organization, the disclosure of which information is likely to
have the effect of causing substantial harm to the competitive position of the
person, firm, partnership, corporation, or other organization from which the
information was obtained....

7 *Id.* at 1-2. This information should be marked as "CONFIDENTIAL BUSINESS
8 INFORMATION, SUBJECT TO PROTECTIVE ORDER." *Id.* at 2. Additionally, paragraph 6
9 specifies that:

10 (1) Confidential Business Information pertaining to licensing or other
11 commercially sensitive financial information shall not be made available under
this paragraph 6 to such designated in-house counsel; the supplier shall designate
such Confidential Business Information pertaining to licensing or other
12 commercially sensitive financial information as "[SUPPLIER'S NAME]
CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS'
EYES ONLY – SUBJECT TO PROTECTIVE ORDER" and promptly provide a
13 redacted version of such document that may be disseminated to the two in-house
counsel designated under this paragraph 6....

15 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states
16 in relevant part that:

17 During the pre-trial phase of this action, such information, whether submitted in
writing or in oral testimony, shall be disclosed only *in camera* before the Court
18 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules
of the United States District Court for the Western District of Washington.

19 *Id.* at 2.

20 Thus, the Protective Order provides that Motorola may request to seal documents by
21 formal motion pursuant to Rule 5(g) of the Local Civil Rules of the Western District of
22 Washington. Local Rule Rule 5(g)(3) states that:

23 (3) A motion to seal a document, even if it is a stipulated motion,
24 must include the following:

25 (A)a certification that the party has met and conferred with all
26 other parties in an attempt to reach agreement on the need to file
the document under seal, to minimize the amount of material

1 filed under seal, and to explore redaction and other alternatives
 2 to filing under seal; this certification must list the date, manner,
 3 and participants of the conference;

4 (B) a specific statement of the applicable legal standard and the
 5 reasons for keeping a document under seal, with evidentiary
 6 support from declarations where necessary.

7 Where parties have entered a litigation agreement or stipulated
 8 protective order (*see LCR 26(c)(2)*) governing the exchange in
 9 discovery of documents that a party deems confidential, a party
 10 wishing to file a confidential document it obtained from another
 11 party in discovery may file a motion to seal but need not satisfy
 12 subpart (3)(B) above. Instead, the party who designated the
 13 document confidential must satisfy subpart (3)(B) in its response to
 14 the motion to seal or in a stipulated motion.

15 Similarly, federal law recognizes that courts should protect trade secrets or other
 16 confidential commercial information by reasonable means, permitting the filing under seal of
 17 documents containing such information. *See Fed. R. Civ. P. 26(c)(1)(G) and (H)* (stating that a
 18 court may require that (1) “a trade secret or other confidential research, development, or
 19 commercial information not be revealed or be revealed only in a specified way” and (2) “the
 20 parties simultaneously file specified documents or information in sealed envelopes...”).

21 Though courts recognize a general right to inspect and copy public records and documents,
 22 including judicial records, the United States Supreme Court has stated that this right is limited.
 23 “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory
 24 power over its own records and files, and access has been denied where court files might have
 25 become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598
 26 (1978). In discussing examples of improper purposes, the Court indicated that courts are not to
 serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

27 As the Ninth Circuit stated:

28 The law, however, gives district courts broad latitude to grant protective orders to
 29 prevent disclosure of materials for many types of information, including, but not
 30 limited to, trade secrets or other confidential research, development, or
 31 commercial information. See Fed. R. Civ. P. 26(c)(7). Rule 26(c) authorizes the
 32 district court to issue “any order which justice requires to protect a party or

1 person from annoyance, embarrassment, oppression, or undue burden.” The
2 Supreme Court has interpreted this language as conferring “broad discretion on
3 the trial court to decide when a protective order is appropriate and what degree of
protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

4 *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

5 **IV. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA
TO FILE THIS MOTION FOR LEAVE TO SEAL**

6 In accordance with the Protective Order and the above-referenced authority, Motorola
7 moves to file the documents described below under seal.

8 Defendants’ Motion for Summary Judgment contains quotes from and summaries of
9 deposition testimony that Microsoft designated as “MICROSOFT CONFIDENTIAL
10 INFORMATION – SUBJECT TO PROTECTIVE ORDER.” This document should accordingly
11 be sealed.

12 Exhibit A to the Declaration of Andrea Pallios Roberts in Support of Defendants’ Motion
13 for Summary Judgment is excerpts of the deposition of Horacio Gutierrez. Microsoft designated
14 this testimony as “MICROSOFT CONFIDENTIAL INFORMATION – SUBJECT TO
15 PROTECTIVE ORDER.” This document should accordingly be sealed.

16 Exhibit G to the Declaration of Andrea Pallios Roberts in Support of Defendants’ Motion
17 for Summary Judgment is a document produced by Motorola in the litigation and bears the
18 designation “Contains Motorola Mobility Inc. and/or Third Party Confidential Business
19 Information. Subject to Protective Order – Attorneys’ Eyes Only.” It contains the confidential
20 business information of both Motorola and a third party. The document should accordingly be
21 sealed.

22 Exhibit H to the Declaration of Andrea Pallios Roberts in Support of Defendants’ Motion
23 for Summary Judgment is a document produced by Microsoft in the litigation and bears the
24 designation “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE
25 ORDER.” The document should accordingly be sealed.

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1 Exhibit I to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
2 for Summary Judgment is a document produced by Motorola in the litigation and bears the
3 designation "MOTOROLA CONFIDENTIAL FINANCIAL INFORMATION-OUTSIDE
4 ATTORNEYS' EYES ONLY-SUBJECT TO PROTECTIVE ORDER." It contains the
5 confidential business information of both Motorola and a third party. The document should
6 accordingly be sealed.

7 Exhibit J to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
8 for Summary Judgment is an excerpt of the sealed trial transcript for November 20, 2012. The
9 document should remain sealed.

10 Exhibit O to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
11 for Summary Judgment is an excerpt of Microsoft's April 3, 2031 Supplemental Objections,
12 Answers, and Responses to Motorola Mobility, Inc.'s First Set of Interrogatories and Requests for
13 Production. Microsoft informed Motorola that this document should be sealed.
14

15 Exhibit Y to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
16 for Summary Judgment is an excerpt of the deposition testimony of Amy Marasco, which
17 Microsoft designated as "HIGHLY CONFIDENTIAL." The document should accordingly be
18 sealed.

19 Exhibit EE to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
20 for Summary Judgment is an excerpt of the Expert Witness Report of Todd Menenberg, which
21 Microsoft designated as "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER." The
22 document should accordingly be sealed.

23 Defendants' Motion to Preclude and Strike Testimony of Todd Menenberg contains
24 information that Microsoft has designated "CONFIDENTIAL-SUBJECT TO PROTECTIVE
25 ORDER." The document should accordingly be sealed.
26

1 Exhibit A to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
2 to Preclude and Strike Testimony of Todd Menenberg is the complete Expert Witness Report of
3 Todd Menenberg, which Microsoft designated as "CONFIDENTIAL-SUBJECT TO
4 PROTECTIVE ORDER." The document should accordingly be sealed.

5 Exhibit B to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion
6 to Preclude and Strike Testimony of Todd Menenberg is an excerpt of the deposition of Todd
7 Menenberg, which Microsoft designated as "HIGHLY CONFIDENTIAL ATTORNEYS EYES
8 ONLY." This document should accordingly be sealed.

9 Defendants' Motion to Exclude and Strike the Testimony of Theo Bodewig contains
10 information that Microsoft has designated "CONFIDENTIAL-SUBJECT TO PROTECTIVE
11 ORDER." The document should accordingly be sealed.

12 Exhibit A to the Declaration of Cheryl Berry in Support of Defendants' Motion to Exclude
13 and Strike the Testimony of Theo Bodewig is Microsoft's April 3, 2031 Supplemental Response
14 to Interrogatory No. 4. Microsoft informed Motorola that this should be sealed

15 Exhibit C to the Declaration of Cheryl Berry in Support of Defendants' Motion to Exclude
16 and Strike the Testimony of Theo Bodewig is an excerpt of the Expert Witness Report of Todd
17 Menenberg, which Microsoft designated as "HIGHLY CONFIDENTIAL ATTORNEYS EYES
18 ONLY." This document should accordingly be sealed

19 **V. CONCLUSION**

20 For the foregoing reasons, Motorola respectfully requests that this Court order that the
21 following document be filed under seal:

22 1. Defendants' Motion for Summary Judgment
23 2. Exhibits A, G, H, I, J, O, Y, and EE to the Declaration of Andrea Pallios Roberts in
24 Support of Defendants' Motion for Summary Judgment.
25 3. Defendants' Motion to Preclude and Strike Testimony of Todd Menenberg

4. Exhibits A and B to the Declaration of Andrea Pallios Roberts in Support of Defendants' Motion to Preclude and Strike Testimony of Todd Menenberg.
5. Defendants' Motion to Exclude and Strike the Testimony of Theo Bodewig
6. Exhibit A and C to the Declaration of Cheryl Berry in Support of Defendants' Motion to Exclude and Strike the Testimony of Theo Bodewig

DATED this 3rd day of July, 2013.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By /s/ Ralph H. Palumbo

By /s/ Philip S. McCune

Ralph H. Palumbo, WSBA #04751

Philip S. McCune, WSBA #21081

ralphp@summitlaw.com

philm@summitlaw.com

By /s/ Thomas V. Miller

Thomas V. Millen

MOTOROLA MOBILITY LLC

600 North U.S. Highway 45

Libertyville, IL 60048-1286

(847) 523-2162

**QUINN EMANUEL URQUHART &
SULLIVAN, LLP**

By /s/ Kathleen M. Sullivan

Kathleen M. Sullivan, NY #1804624

51 Madison Ave., 22nd Floor

New York, NY 10010

(212) 849-7000

kathleensullivan@quinnemanuel.com

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1 By /s/ Brian C. Cannon
2

3 Brian C. Cannon, CA #193071
4 555 Twin Dolphin Drive, 5th Floor
5 Redwood Shores, CA 94065
6 (650) 801-5000
7 *briancannon@quinnmanuel.com*

8 By /s/ William C. Price
9

10 William C. Price, CA #108542
11 865 S. Figueroa Street, 10th Floor
12 Los Angeles, CA 90017
13 (213) 443-3000
14 *williamprice@quinnmanuel.com*

15 ***Attorneys for Motorola Solutions, Inc.,
16 Motorola Mobility LLC and General
17 Instrument Corp.***

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Arthur W. Harrigan, Jr., Esq.
Christopher T. Wion, Esq.
Shane P. Cramer, Esq.
Calfo Harrigan Leyh & Eakes LLP
arthurh@calfoharrigan.com
chrisw@calfoharrigan.com
shanec@calfoharrigan.com

Richard A. Cederoth, Esq.
Brian R. Nester, Esq.
David T. Pritikin, Esq.
Douglas I. Lewis, Esq.
John W. McBride, Esq.
David Greenfield, Esq.
William H. Baumgartner, Jr., Esq.
David C. Giardina, Esq.
Carter G. Phillips, Esq.
Constantine L. Trela, Jr., Esq.
Ellen S. Robbins, Esq.
Nathaniel C. Love, Esq.
Sidley Austin LLP
rcederoth@sidley.com
bnester@sidley.com
dpritikin@sidley.com
dilewis@sidley.com
jwmcbride@sidley.com
david.greenfield@sidley.com
wbaumgartner@sidley.com
dgiardina@sidley.com
cphillips@sidley.com
ctrela@sidley.com
erobbins@sidley.com
nlove@sidley.com

T. Andrew Culbert, Esq.
David E. Killough, Esq.
Microsoft Corp.
andrycu@microsoft.com
davkill@microsoft.com

DATED this 3rd day of July, 2013.

/s/ Marcia A. Ripley

Marcia A. Ripley

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